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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/774,850	02/09/2004	Ronald A. Bement	BEM-0001	9513
27447	7590	04/06/2006		
SHAWN HUNTER P.O Box 270110 HOUSTON, TX 77277-0110			EXAMINER ALIMENTI, SUSAN C	
			ART UNIT 3644	PAPER NUMBER
DATE MAILED: 04/06/2006				

Please find below and/or attached an Office communication concerning this application or proceeding.

# Office Action Summary

Application No.

10/774,850

Applicant(s)

BEMENT, RONALD A.

Examiner

Susan C. Alimenti

Art Unit

3644

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

## Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

## Status

- 1) ☒ Responsive to communication(s) filed on 20 January 2006.
- 2a) ☒ This action is FINAL. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

## Disposition of Claims

- 4) ☒ Claim(s) 21-25, 27-31, 33-37 and 39 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 21-25, 27-31, 33-37 and 39 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

## Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

## Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
  - ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

## Attachment(s)

- |  |   |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892)   | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)                                   | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152)             |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)<br>Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____  |

## DETAILED ACTION

### *Claim Rejections - 35 USC § 103*

1. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

2. Claims 34-37 are rejected under 35 U.S.C. 103(a) as being unpatentable over Curtiss (US 1,446,416).

Regarding claims 34, and 35, Curtiss discloses the claimed invention except the cover is cylindrical in shape and therefore does not have four defined sidewalls. Curtiss' method of protecting a plant from frost damage comprises first providing a cover 10 made of a fabric such as burlap (col.2, ln.2) which is resistant to frost but substantially allows air, water, and light to pass therethrough. The cover 10 further comprises a top wall defined as the lateral top portion, and further has an opening in the bottom through which a plant is passed therethrough. A drawstring 14 is provided to tighten and reduce the bottom opening. While Curtis does not positively disclose an embodiment wherein four sidewalls are shown, Curtiss notes that "minor changes in the size, form and construction of the various parts. . . may be made and substituted for those herein shown and described without departing from the spirit of my invention," (col.5, lns.31-37). It would have been obvious to one having ordinary skill in the art at the time the invention was made to change the shape or form of the cover, since it has been held that "there is no invention in merely changing the shape or form of an article without changing its function except in a design patent." *Eskimo Pie Corp. v. Levous et al.*, 3 USPQ 23.

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The protective cover resists frost (col.2, lns.77-79), and is considered to allow air water and light to *substantially* pass therethrough since these elements are essential to the life of a plant, and a cover that would deprive a tree or plant of these elements would result in the death of the plant.

Regarding claims 36 & 37, Curtis does not positively show alternate fasteners to the drawstring, however, the examiner takes Official Notice that an elastic band, or hook and loop fastener are considered art recognized equivalents for performing the same function. It would have been obvious to one having ordinary skill in the art at the time the invention was made to use other types of fasteners that would be functionally equivalent to a drawstring, as such would not depart from the spirit of Curtiss' invention.

3. Claim 39 is rejected under 35 U.S.C. 103(a) as being unpatentable over Curtiss as applied to claim 34 above, and further in view of Andros et al. (US 5,956,923).

Curtis discloses the claimed method except he does not positively disclose covering a plurality of plants. Andros et al. teaches covering multiple plants, for example in a nursery or other agricultural mass-production facility. Covering multiple plants at once is well known in the art to be more time efficient to apply and remove only one cover from multiple trees or plants. It would have been obvious to one having ordinary skill in the art at the time the invention was made to modify Curtiss' cover so that it may cover a plurality of plants in order to be more time efficient in a nursery-type environment.

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4. Claims 21-25 and 28-31 are rejected under 35 U.S.C. 103(a) as being unpatentable over Curtiss as applied to claims 34-37 above, and further in view of Morrisoe (US 4,646,467).

Curtiss discloses the claimed invention, as discussed and modified above, except the cover material is not a spun bonded polypropylene. It is first noted that Curtiss' invention was disclosed in 1922, when such man-made fabrics were not available. In more recent years certain polymer textiles became available to one in the art. Morrisoe discloses a weather protecting cover similar to Curtiss', and teaches fabricating it from a spun-bonded polypropylene textile because such textiles provide a more durable longer-lasting product (Morrisoe, col.1, ln.58 through col.2, ln.5). It would have been obvious to one having ordinary skill in the art at the time the invention was made to use a spun-bonded polypropylene fabric instead of burlap, in order to provide a more durable and dependable fabric.

Curtiss' protective cover resists frost (col.2, lns.77-79), and is considered to allow air water and light to *substantially* pass therethrough since these elements are essential to the life of a plant, and a cover that would deprive a tree or plant of these elements would result in the death of the plant.

5. Claims 27 and 33 are rejected under 35 U.S.C. 103(a) as being unpatentable over Curtiss in view of Morrisoe as applied to claims 21-26 and 28-32 above, and further in view of Andro et al.

Curtis, as modified, discloses the claimed method except he does not positively disclose covering a plurality of plants. Andros et al. teaches covering multiple plants, for example in a nursery or other agricultural mass-production facility. Covering multiple plants at once is well

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known in the art to be more time efficient to apply and remove only one cover from multiple trees or plants. It would have been obvious to one having ordinary skill in the art at the time the invention was made to modify Curtiss' cover so that it may cover a plurality of plants in order to be more time efficient in a nursery-type environment.

### *Response to Arguments*

6. Applicant's arguments filed 20 January 2006 have been fully considered but they are not persuasive.

Applicant first asserts that the examiner has not established a prima facie case of obviousness because a secondary reference suggesting the four-wall construction was not set forth. The examiner respectfully disagrees and maintains that the change of shape from a round one-piece cover to a relatively square four-piece, sewn cover is an general design choice that would have been obvious to one of ordinary skill in the art. Applicant's own disclosure illustrates in Figures 1-3 that the round versus square construction is equally interchangeable for performing the same function.

Applicant further argues that the Curtiss reference is insufficient because it allegedly blocks air, water and light from passing through the cover. The examiner respectfully disagrees, and first points out that Curtiss discloses that the cover may be made from burlap, which is clearly a permeable layer to both air, water, and light (Curtiss, col.2, ln.2). It is acknowledged that Curtiss' cover may act to insulate the system when a heater is injecting air under said cover, however, no where does Curtiss teach that the burlap cover prevents any air from passing therethrough. Further, even though the cover may also serve as a shade cloth, it only acts to

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prevent *direct rays, not all rays*, from hitting the fruit, while “at the same time the fruit has ample ventilation,” (Curtiss, col.3, Ins.8-15). Providing a cover that prevents the passage of air, water, and light would in essence kill the plant it was meant to protect, by suffocating the plant, promoting the growth of fungus, and denying the plant natural light rays it needs for photosynthesis. Such a cover would be contrary to the purposes of any plant grower’s intentions.

### ***Conclusion***

7. Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than **SIX MONTHS** from the date of this final action.

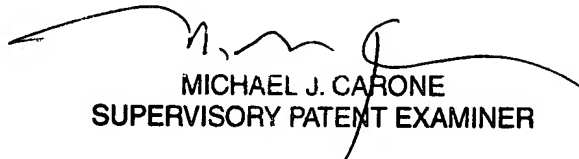
8. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Susan C. Alimenti whose telephone number is 571-272-6897. The examiner can normally be reached on Monday-Friday, 9am-5pm.

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If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Teri Luu can be reached on 571-272-7045. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

9. Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

Susan C. Alimenti



MICHAEL J. CARONE  
SUPERVISORY PATENT EXAMINER